

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUTH K. KITETA	:	DETERMINATION
	:	DTA NO. 815119
for Redetermination of a Deficiency or for Refund	:	
of New York State and New York City Income Taxes	:	
under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Year 1990.	:	

Petitioner, Ruth K. Kiteta, 29 East 29th Street, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1990.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 19, 1997 at 1:15 P.M. The Division submitted a letter in lieu of a brief. Petitioner's letter in lieu of a reply brief was received on June 23, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

ISSUE

I. Whether petitioner has proven that the Notice of Deficiency issued by the Division of Taxation in regard to her 1990 resident income tax return, was incorrect or erroneous in any manner.

II. Whether petitioner has proven that her failure to pay the correct amount of tax for the year 1990 was due to reasonable cause and not negligence, thereby allowing for the abatement of the negligence penalty.

III. Whether petitioner has proven that she did not receive or negotiate the refund check issued to her relating to her 1990 resident income tax return, and is therefore entitled to either a reduction in the amount of the Notice of Deficiency, or a refund.

FINDINGS OF FACT

1. Petitioner filed a 1990 Resident Income Tax Return for New York State and New York City (hereinafter "State return"). Petitioner also filed a 1990 U.S. Individual Income Tax return (hereinafter "Federal return"). Both of these returns were introduced into evidence at the hearing in this matter.

2. The 1990 State return as filed by petitioner showed a refund due to petitioner of \$271.23. The Division allowed a refund in the lesser amount of \$247.23 due to several mathematical errors in petitioner's return. The first was an error in subtraction. When subtracting \$2000.00 (Line 49) from \$45,939.49 (Line 48) petitioner obtained the result of \$43,899.49 (Line 50) instead of the correct result of \$43,939.49. The second was an error in addition. When adding \$3,096.00 (Line 58), \$1,502.00 (Line 67) and \$20.00 (Line 68) petitioner obtained the result of \$4,598.00 (Line 69) instead of the correct result of \$4,618.00.

3. A refund check dated June 10, 1991 in the amount of \$247.23 was issued in petitioner's name and setting forth petitioner's correct address. The Division introduced a photocopy of the check in question. On the reverse side of the check appears the handwritten endorsement "Ruth Kiteta For Deposit Only". There are other various markings on the back of the check, most of which are illegible. Of those that are legible are several dates, "June 1991" and "June 17, 1991", and the initials "F.R.B.", presumably referring to a Federal Reserve Bank. These markings are all consistent with a check dated June 10, 1991 having been negotiated. There are some markings on the face of the check, but these are illegible. The handwritten signature of Ruth Kiteta in the endorsement is similar to petitioner's signature on her Federal and State returns, petition and letter in lieu of a reply brief. The markings on the check together with the endorsement indicate that the check was negotiated.

Petitioner testified that she never received or negotiated the refund check in question. She also introduced photocopies of checks from her checking account with Citibank. The purpose of her submission was to show that when she received her original negotiated checks back from her bank each check clearly indicated the name of the bank that had negotiated the check.

4. On September 27, 1993 the Division issued to petitioner a Notice and Demand for Payment of Tax Due (notice number L-007965843) in the amount of \$236.30 in tax due and \$46.16 in interest due for a total of \$282.46. Petitioner paid this amount. The basis of the notice was that petitioner had claimed two dependent exemptions in the amount of \$2,000.00 on line 49 of her State return.

Petitioner testified that she had never claimed more than one exemption for income tax purposes. However, the testimony offered by petitioner on this issue centered on how increasing or decreasing the number of "exemptions" she claimed affected her paycheck. Therefore, it is

evident that petitioner's testimony concerned allowances for withholding tax purposes and did not relate to exemptions as claimed on line 49 of her State return.

Line 49 of petitioner's State return was for dependent exemptions. Petitioner listed \$2,000.00 on this line of her return which equals two dependent exemptions at \$1,000.00 each. There is no doubt from the face of the return that petitioner claimed two dependent exemptions on her State return. Petitioner's filing status is clearly listed as single on line 1 of her Federal and State returns. On her Federal return petitioner claimed only an exemption for herself as indicated on lines 6a through 6e and 36. Petitioner was entitled to claim only those dependent exemptions listed on her Federal return. There were no dependent exemptions listed on petitioner's Federal return and therefore, petitioner was not entitled to the \$2,000.00 claimed on her State return.¹

5. On October 18, 1993 the Division issued to petitioner a Statement of Proposed Audit Changes in the amount of \$1,267.00 in tax due, \$252.72 in interest due and \$189.71 in penalty due for a total of \$1,709.43. This statement was again based on petitioner's 1990 State return. The statement explained that information concerning petitioner's 1990 Federal return had been provided to the Division by the Internal Revenue Service pursuant to IRC § 6103(d) and that the statement could not have been issued until that time because of the length of time it took to receive and process the Internal Revenue Service information. The Division stated that differences had been found between the amounts listed on petitioner's Federal return and those listed on petitioner's State return.

¹Petitioner was allowed a personal exemption on her Federal return. However, since 1988 Tax Law § 616 does not provide for personal exemptions, only dependent exemptions. This does not appear to be the basis of petitioner's confusion in any event because petitioner claimed two dependent exemptions on her State return and only one personal exemption on her Federal return.

Petitioner testified that she merely copied the numbers from the Federal return to the State return and that therefore the numbers could not have been different. Petitioner is correct in that the amounts she provided on both returns for itemized deductions were identical.

However, the Internal Revenue Service disallowed petitioner's casualty loss in the amount of \$500.00 and recalculated petitioner's medical expense deduction.² Therefore, the amounts *as allowed* by the Internal Revenue Service did not match the numbers as provided by petitioner on her State return. Petitioner also neglected to add back to her Federal itemized deductions the amount of State and local income taxes included in such deductions, as required on line 40 of the State return to arrive at State itemized deductions.

The result of these modifications was that petitioner's New York taxable income was adjusted upward by \$10,805.00 for a corrected New York State taxable income of \$54,745.00. This resulted in the further tax due of \$1,267.00. The statement informed petitioner that if payment was not received by November 17, 1993 a Notice of Deficiency would be issued.

On November 29, 1993 the Division issued to petitioner a Notice of Deficiency (notice number L-008045979) in the amount of \$1,267.00 in tax due, \$263.25 in interest due and \$194.97 in penalty due for a total of \$1,725.22.

6. Petitioner requested a conciliation conference from the Bureau of Conciliation and Mediation Services of the Division and on March 22, 1996 a Conciliation Order was issued sustaining the statutory notice in full. The Division of Tax Appeals received a petition protesting the Conciliation Order on June 10, 1996. Both the conciliation order and the petition list the notice at issue as notice number L-008045979.

²The incorrect amount of medical expense deductions claimed by petitioner was the result of a multiplication error evidenced by line 3 of Schedule A of the Federal return.

The petition in this matter addresses primarily the issue of whether petitioner received her refund check. It does, however, state that petitioner does not understand how she could owe more money for the tax year 1990. Petitioner's testimony at the hearing was somewhat confused on the question of what notice or notices issued by the Division she had protested. In particular, she testified that she could not recall receiving the Notice of Deficiency, and that she did not understand why the additional amounts contained in the Notice and Demand were assessed after modifications had already been made prior to the Division's issuing the refund check in a reduced amount from what she had claimed.

7. The Tax Appeals Tribunal issued a decision concerning this taxpayer in a case that involved similar issues for the tax year 1989 (*Matter of Kiteta*, Tax Appeals Tribunal, May 22, 1997). The facts found by the Tax Appeals Tribunal in the first case indicate that a notice was issued as a result of IRS adjustments to petitioner's 1989 itemized deductions as listed on her Federal return for that year. A refund check had been issued prior to the notice and petitioner claimed not to have received or negotiated the refund check. The photocopy of the refund check in evidence had keypunched numbers on the front of the check indicating the amount of the check. The reverse side of the photocopy of the check was of poor quality but there appeared to be numbers indicating bank processing. Also on the reverse side of the check was the handwritten notation "For Deposit Only" and what appeared to be petitioner's signature. The Tax Appeals Tribunal upheld the administrative law judge's finding that the signature on the check was similar to that appearing on several other documents in evidence: petitioner's 1989 Federal and State income tax returns, petitioner's Request for a Conciliation Conference, her petition and her reply letter brief. Petitioner conceded during her testimony that the signature on the check resembled her signature. The Tax Appeals Tribunal upheld the determination of the

administrative law judge that petitioner had failed to prove her factual contentions regarding the refund check (*Matter of Kiteta, supra*).

STATEMENT OF THE PARTIES' POSITIONS

8. The Division asserts, in its brief, that petitioner did not contest the basis of the Notice of Deficiency issued, and that therefore the only issue is whether petitioner has proven that she did not receive or negotiate the refund check issued by the Division. Regarding petitioner's argument that she did not receive her refund check for 1990 the Division argues that had the check not been paid the Division would not have been able to obtain a copy of the check from its bank. Also, the markings on the reverse side of the check indicate that it was negotiated, as does petitioner's signature. Finally, the Division asserts that petitioner did not submit into evidence any of her bank deposit records in an attempt to prove that the refund check had not been deposited. The Division contends that since the check was negotiated, it is petitioner's burden to prove that the endorsement was a forgery.

In its closing argument at the hearing the Division argued that the negligence penalty should be upheld. The Division argues that petitioner made the same type of mistakes on her 1989 return and also claims she did not receive her 1989 refund. Furthermore, the 1989 return was also the subject of a conciliation conference, Division of Tax Appeals hearing including a determination and a Tax Appeals Tribunal decision. Under these circumstances the Division argues that the negligence penalty should be upheld.

9. With regard to the Notice and Demand, petitioner asserts that she has never claimed more than one exemption. With regard to the Notice of Deficiency, petitioner asserts that first, she does not remember receiving it, and second, that the amounts listed on her Federal return and State return must be the same because she merely copies them. Petitioner did not raise or present

arguments or evidence on the issue of penalties. On the issue of the refund, petitioner maintains that she did not receive the refund, and never received a refund from New York State prior to 1992. She argues that the Division should be able to go to its bank and determine from them what bank the refund check was deposited into and verify that it was deposited into her account. She asserts that she is unable to do this because the photocopy of the check presented does not indicate the name of either the Division's bank or the bank that originally cashed the check and only contains "keypunch" marks. Furthermore, petitioner asserts that because there is no name of a bank stamped on the check and only these other "keypunch" marks that it is not possible to determine if the check was cashed at all. Her response to the Division's argument that had the check not been cashed they would not have been able to obtain a copy from their bank, is that if they obtained a copy of the check from the bank they should be able to provide her with the name of the bank.

CONCLUSIONS OF LAW

A. It must first be determined what is at issue in this matter, since the parties seem to have varying viewpoints. Petitioner did not object to the modifications made by the Division prior to the issuance of the refund check, therefore, these modifications are not at issue. The Notice and Demand for Payment of Tax Due (notice number L-007965843) issued in this matter is also not at issue in the current proceedings. This is the notice relating to the number of exemptions claimed by petitioner on line 49 of her State return. Petitioner did testify that she had never claimed more than one exemption and argued this point in her letter in lieu of a reply brief. However, the petition filed in this matter, and the Conciliation Order protested by the petition, specifically list only notice number L-008045979, the Notice of Deficiency issued on November 29, 1993. There is no mention in the petition of notice number L-007965843, the

Notice and Demand for Payment of Tax Due issued on September 27, 1993. Since this notice was not petitioned, the Division of Tax Appeals has no jurisdiction to address petitioner's substantive arguments regarding this notice (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Contrary to the Division's assertion, the Notice of Deficiency (notice number L-008045979) issued on November 29, 1993 is at issue. The petition is clear that petitioner does not understand the additional liability asserted in this matter, and therefore disagrees with it. Petitioner's testimony confirms that the basis of the notice is at issue since she testified that she could not have reported different numbers on her Federal return than her State return because she always copied the numbers from one return to the other. Therefore, the basis of the Notice of Deficiency will be addressed.

The issue of the negligence penalty will also be addressed since the Division argued the issue in its closing argument at the hearing.

B. It is the petitioner's burden to prove that the Notice of Deficiency issued by the Division is erroneous (Tax Law § 689[e]; *Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398). With regard to the Notice of Deficiency, there are several issues. For a State itemized deduction, petitioner was entitled to the amount of her Federal itemized deductions, with certain modifications to be discussed later (Tax Law § 615[a]). A comparison of the amounts listed as itemized deductions on petitioner's Federal and State returns indicates that petitioner did, in fact, enter the identical amounts on both returns. However, the Division obtained information from the IRS pursuant to IRC § 6103 that showed the IRS did not allow all of the itemized deductions claimed by petitioner on her Federal return. Specifically, the IRS disallowed a \$500.00 casualty loss and

allowed only \$453.00 of the \$885.00 medical expense deduction claimed by petitioner. Petitioner is allowed to claim on her State return only the itemized deductions allowed on her Federal return. Petitioner did not introduce any evidence in support of her position that the Notice of Deficiency as it relates to this issue was erroneous. Therefore, the Notice of Deficiency is entitled to a presumption of correctness and petitioner has failed to meet her burden of proof on this issue (*Matter of Leogrande v. Tax Appeals Tribunal, supra*).

The second issue has to do with the modifications which are required to Federal itemized deductions to reach State itemized deductions. Any State and local income taxes included in Federal itemized deductions must be added back in to arrive at State itemized deductions (Tax Law § 615[c][1]). Petitioner was required to enter on line 40 of her State return \$11,048.83, the amount of State and local income taxes included in her Federal itemized deductions. Petitioner entered zero. Therefore, the Division was also correct in not allowing the \$11,048.83 as a deduction. Petitioner did not address this issue during the course of the proceedings except for her testimony that she copied the figures from one return to the other. As pointed out by the Division, copying the figures in this instance would result in a mistake in the return, because State itemized deductions, while starting with the Federal itemized deductions, are not identical to the Federal number. Again, petitioner did not introduce any evidence in support of her position that the Notice of Deficiency as it relates to this issue was erroneous. Therefore, the Notice of Deficiency is entitled to a presumption of correctness and petitioner has failed to meet her burden of proof on this issue (*Matter of Leogrande v. Tax Appeals Tribunal, supra*).

C. Having determined that the tax due as set forth on the Notice of Deficiency issued by the Division is correct, the next issue to be addressed is whether petitioner has proven that her failure to pay the correct amount of tax for 1990 was due to reasonable cause and not negligence

thereby allowing for the abatement of penalties assessed (Tax Law § 685[b]). The Division argued that one reason for sustaining the negligence penalty was that petitioner continued to make the same mistakes year after year. The Division's argument is based on *Matter of Kiteta* (*supra*), involving the same petitioner and similar facts. The facts as set forth by the Tax Appeals Tribunal in that case indicate that the deficiency was the result of IRS adjustments made to petitioner's itemized deductions as reported on her 1989 Federal return. Therefore, while the precise nature of the IRS adjustments in the first case are not known, the adjustments were similar in nature to those in the present case. Petitioner did not raise, argue or present any evidence on this issue. Under these circumstances, since petitioner has not presented any evidence tending to show that her failure to pay the correct amount of tax was due to reasonable cause, the negligence penalty assessed pursuant to Tax Law § 685(b) must be sustained (*see, Matter of Albanese*, Tax Appeals Tribunal, July 17, 1997; *Matter of Gucci*, Tax Appeals Tribunal, July 10, 1997).

D. The final issue, having sustained the notice as issued by the Division, is whether petitioner is entitled to a credit against these liabilities in the amount of \$247.23, the amount of the refund check issued to petitioner which she claims to have not received. The Tax Appeals Tribunal has upheld an Administrative Law Judge determination on this issue with regard to this petitioner for a different tax year (*Matter of Kiteta, supra*). The facts in this matter are almost identical to those in the previous case. The photocopy of the check in evidence in the first case had keypunched numbers on the front of the check indicating the amount of the check. The reverse side of the check was poor in quality but there appeared to be numbers which would indicate bank processing. In the current case whatever markings appear on the front of the copy of the check in evidence are illegible. However, the markings on the reverse side of the check,

including consistent dates and the initials “F.R.B.” presumably referring to a Federal Reserve Bank, indicate that the check was indeed negotiated. On the reverse of the checks in both cases appeared petitioner’s signature and the handwritten words “For Deposit Only”. In both cases the signature appearing on the reverse side of the check was distinctly similar to examples of petitioner’s signature contained in the record.³ Petitioner has presented no facts or arguments that distinguish the current case in any way from the first case. Therefore, petitioner has not met her burden of proof to show that she did not receive or negotiate the refund check in question, and is not entitled to any credit against the Notice of Deficiency (*Matter of Kiteta, supra*).

E. The petition of Ruth K. Kiteta as it pertains to Notice and Demand for Payment of Tax Due (notice number L-007965843) dated September 27, 1993 is dismissed, and as it pertains to Notice of Deficiency (notice number L-008045979) dated November 29, 1993 is denied. The Notice and Demand for Payment of Tax Due (notice number L-007965843) dated September 27, 1993 and Notice of Deficiency (notice number L-008045979) dated November 29, 1993 are sustained.

DATED: Troy, New York
December 18, 1997

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE

³There is a difference in the proof in the cases on this point in that in the first case petitioner conceded that the signature on the check was similar to her signature. However, having found that the signatures are similar, petitioner’s concession of this point is not significant.